Supreme Court, U.S.
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No. 94

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID A. WILLIS,

Petitioner,

v.

JAMES E. AIKEN, Commissioner,
Indiana Department of Corrections,
PORTER SUPERIOR COURT and
LINLEY E. PEARSON, Attorney
General of Indiana,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a precedential decision of the Indiana Court of Appeals upholding a state court jury instruction that "you are to determine the law for yourself," and that the other instructions are only "the best source of the law," conflict with this Court's decisions requiring state jury instructions to implement federal constitutional guarantees of due process?

Can the same precedential decision escape federal habeas corpus review because Indiana's "fundamental error" doctrine may be independent of federal law, even though the decision makes no "plain statement" of reliance on state law rather than federal?

Is it a "new rule" to prohibit state courts from telling juries they are not bound by the Constitution?[1]

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[1]If certiorari is granted, Willis will ask to argue a fourth issue: whether Indi-

PARTIES

The names of all parties appear in the caption of the case. There is no parent or subsidiary company to be included under Supreme Court Rule 29.1.

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ana fundamental error doctrine really is independent of federal law.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David Willis asks that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in his case.

OPINIONS BY OTHER COURTS

1. Decision of which review is sought: Willis v. Aiken, 8 F.3d 556 (7th Cir. 1993) (App. A)

2. Direct appeal from conviction: Willis v. State, 512 N.E.2d 871 (Ind. App. 1987), transfer denied (App. B)

3. State postconviction proceedings: State v. Willis, No. 85-PSCr-49, slip. op. (Porter Super. Ct. Nov. 29, 1988) (App. C)

4. Appeal of state postconviction decision: State v. Willis, 552 N.E.2d 512 (Ind. App. 1990), transfer denied (1991) ("Willis II") (App. D)

5. Federal habeas corpus: Willis v. Aiken, No. H91-147, slip op. (N.D. Ind. Dec. 4, 1991) (App. E)

6. Federal habeas corpus judgment, December 6, 1991 (App. F)

JURISDICTION

The Court of Appeals for the Seventh Circuit rendered its judgment in this matter on October 29, 1993. There were no orders on rehearing or extending the time to petition for certiorari. This Court's jurisdiction is conferred by 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal cases whatever, the jury shall have the right to determine the law and the facts.

IND. CONST. art. I, § 19.

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art. VI.

> No State shall make or enforce any law which shall

> abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This is an appeal from the denial of a petition for a writ of habeas corpus.

David Willis is 62 years old, and was for many years a trial lawyer in Valparaiso, Indiana with a solo practice. He is a former board member and secretary of the Indiana Bar Association. In 1984, Willis received a check for about $15,000 in settlement of a client's claim and used the funds to retire a personal obligation. A short time later, before the issuance of any criminal charges, he repaid the client with interest. Still, Indiana charged Willis with felony theft.

Willis's 1986 trial in Porter Superior Court began with this instruction:

> Since this is a criminal case the Constitution of the State of Indiana makes you the judges of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.

Trial Record ("T.R.") at 46, 49. The instruction was, and still is, an Indiana pattern. Indiana Pattern Jury Instructions (Criminal) § 1.03. Willis did not object to it.

The trial was full of invitations for the jury to determine the law for itself. Most egregiously, in closing argument, the prosecutor argued that Willis should carry "the burden":

> The evidence shows this was not the only position of trust that he violated. Cross-examination. Disciplinary complaint. Roberta Clausen. She got a life insurance check, bounced. What's he doing with this money? It's just not fair to put the burden on us as to his actions.

T.R. at 651.

The trial judge then followed with final instructions, invoking the protections guaranteed by the federal Constitution but then repeating the instruction to "determine the law for yourself," using the court's instructions only as "the best" source of that law. T.R. at 55.

The six-person jury convicted, and the trial court later sentenced Willis to a two-year term of imprisonment. T.R. at 95, 675. He was confined in the Indiana prison system for one year and spent a second year on parole. He

brought this petition while he was incarcerated.

PRESENTATION AND RESOLUTION OF THESE ISSUES BELOW

Willis did not object to the pattern instruction at trial, nor did he call it error on direct appeal. He did challenge the instruction, and other aspects of his trial as well, in a petition for postconviction relief filed in the Indiana courts. A state trial court granted that petition, but not on this ground. App. C.[2] Thus Indiana appealed, and Willis cross-appealed challenging this instruction.

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[2]The postconviction trial court held, oddly, that the challenge to the instruction was barred by "*res adjudicata*" - one spelling of the name for Indiana's doctrine that issues decided on appeal cannot be heard in a postconviction proceeding. App. C-7. Since the challenge had not been made on direct appeal, this ruling made no sense, but it did not affect later proceedings.

The Indiana Court of Appeals reversed the trial court, rejecting all of Willis's claims. On this issue, the court phrased the question as "[w]hether an instruction that the jury could determine the law denied Willis basic constitutional rights and due process." Willis II, 552 N.E.2d at 513, App. D-9. The court noted that Willis "failed to object to this instruction at trial," and that he had challenged the instruction as fundamental error. Id. at 515, App. D-10.

Then the court went on to discuss article I, section 19 of the Indiana constitution, note its purpose, and quote at length from Indiana opinions approving the state's scheme of jury as judge of the law. Finally, the Indiana court rejected explicitly, with discussion, (although citing only Indiana cases) Willis's claim that the jury instruction

giving effect to article I, section 19 "deprives criminal defendants of basic constitutional protections." Willis II, 552 N.E.2d at 515-16, App. D-14. In the end it held that "[n]o fundamental error exists." 552 N.E.2d at 516, App. D-15. No form of the word "waiver" was used in this section of the opinion.

Willis then filed a petition for habeas corpus in the district court for the Northern District of Indiana. The district court held that the state court decision rested on state law grounds, reading the Indiana court's substantive discussion to have relied upon the Indiana constitution and Indiana case law. Willis v. Aiken, No. H91-147 slip op. at 15, App. E-18-19.

The Court of Appeals for the Seventh Circuit upheld the denial of habeas, but rejected the district court's

reasoning. The state court had clearly addressed the federal issue: "It would indeed be unusual for the appellant to argue, or for the state court to assume, that one part of the state constitution might be rendered 'unconstitutional' by another section of the same document. . . . Any holding that a provision of the state constitution does not deny due process must necessarily include a determination that the state constitutional provision is not violative of the Federal Constitution." 8 F.3d at 562; App. A-9-10.

Further, the Seventh Circuit made it clear that it was unhappy with the Indiana instruction: "We certainly do not want to be misunderstood as condoning the problematic instruction at issue in this case." 8 F.3d at 568, App. A-22. Nevertheless, the court rejected

Willis's claims on procedural grounds. The state court, said the Seventh Circuit had rested its decision not on a holding that the instruction was correct, but rather on a holding that the instruction was not fundamental error. That latter holding, said the Seventh Circuit, was an independent and adequate state ground. 8 F.3d at 567, App. A-20.

In reaching this holding, the court declined to apply the presumption of Harris v. Reed, 489 U.S. 255 (1989), that "if 'it fairly appears that the state court rested its decision primarily on federal law,' [federal courts] may reach the federal question on review unless the state court's opinion contains a '"plain statement" that [its] decision rests upon adequate and independent state grounds.'" Harris, 489 U.S. at 261, quoting Michigan v. Long, 463 U.S. 1032,

1042 (1983). Noting the absence of applicable guidance from this Court, the court decided that the Harris presumption's predicate was not satisfied. Even though the state court had addressed the federal constitutional issue, the court held, it had done so "only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue constitutes 'fundamental error.'" 8 F.3d at 562, App. A-8-9. Indiana's fundamental error doctrine, in turn, is itself independent of federal law, the court decided. 8 F.3d at 566-67, App. 18-20. Therefore, the state court opinion upholding the instruction, although addressing federal issues, did not fairly appear to rest on federal law. 8 F.3d at 567, App. 20.

As an alternative holding, the Seventh Circuit also held that the rule

Willis seeks would be "new" under Teague v. Lane, 489 U.S. 288 (1989), and that habeas relief was barred for that reason as well.

FEDERAL JURISDICTION BELOW

The district court had jurisdiction over this petition for writ of habeas corpus under 28 U.S.C. §§ 2241, 2254 and 1331. After the district court's adverse judgment, which was entered December 4, 1991, Willis timely filed a notice of appeal and sought a certificate of probable cause from the district court, but that court refused to issue the certificate by decision dated January 6, 1992. Acting on Willis's subsequent motion in the Court of Appeals, on January 17, 1992 that Court granted a certificate of probable cause. The Court of Appeals thus had jurisdiction over this appeal from denial of a writ of

habeas corpus pursuant to 28 U.S.C. §§ 1291 and 2253.

SUMMARY OF ARGUMENT

Indiana courts instruct every criminal jury that it is "the judge of the law." No caveat excepts that law which the jury may not "judge," but must faithfully apply: the protections guaranteed to defendants by the federal Constitution. Commonly the instruction is the pattern given here, that the jury may "determine the law for [it]self," using the trial court's instructions as only "the best source" of the law.

This case now presents two incompatible truths. The state court opinion in Willis II is Indiana precedent for the substantive, and clearly mistaken, proposition that the instruction is

proper;[3] but the federal courts believe they cannot condemn the instruction because Indiana did not decide federal law.

The incompatibility of those two truths underlies each of the three reasons why certiorari should be granted in this case. First, Indiana has decided that juries may be told they can ignore

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[3] Fuquay v. State, 583 N.E.2d 154, 156 (Ind. Ct. App. 1991). In Fuquay, the defendant had requested a jury-as-judge instruction somewhat broader than this pattern, stressing that the trial court's instructions were "not necessarily binding" and that the jury had "the right to independently determine the law to be different from the instruction from the Court." 583 N.E.2d at 156. Rejecting the appeal, the court of appeals cited Willis II as upholding a properly limited instruction: "In State v. Willis, [citation], this court upheld an instruction stating: [instruction quoted]. The decision in Willis relied heavily upon the opinion of Justice Arterburn in Beavers [v. State, 236 Ind. 549, 141 N.E.2d 118 (1957)]. Thus, it seems clear that in exercising their constitutional right to determine the law, juries, under their oaths, are bound to determine it correctly, and that an instruction which would lend credence to the view that the jury was free to 'do its own thing' and determine the law in accordance with its own personal opinion as to the law, is erroneous and should not be given." Id. at 156-57.

the Constitution. That state court decision conflicts with every decision of this Court which requires firm and accurate jury instructions on constitutional protections. Second, the Seventh Circuit has found the Indiana decision unreviewable although it contains no plain statement of an intent to rely on state waiver law. That decision is in conflict with Harris v. Reed, 489 U.S. 255 (1989), and allows a state decision on the merits to stand unreviewed. And third, the Seventh Circuit has found it to be a "new rule" to require juries to follow the Constitution. In doing so, Willis submits, the court has made "old" rules a null set, and thus effectively eliminated habeas corpus itself.

The result: Indiana lawyers, following Willis II, will keep failing to object to this instruction. For those

who finally do, Indiana courts, following Willis II, will continue to uphold it. And in the months and years before the federal courts finally hear a case where the issue was preserved at trial, every Indiana criminal defendant will be tried by a jury which is told that it need not follow the law.

I. THE INDIANA COURT OF APPEALS HAS DECIDED THAT CRIMINAL JURIES MAY BE TOLD THEY ARE NOT BOUND BY THE FEDERAL CONSTITUTION.

"[D]etermine the law for yourself," with the trial court's instructions as a guide. This instruction freed the jury to conduct a referendum on the Bill of Rights. The instruction made Willis's trial fundamentally unfair, and not just in theory. When the prosecutor explicitly invited Willis's jury to place the burden of proof on the defendant, saying, "It's just not fair to put the burden on us as to his actions," T.R. at

651, she was speaking to a jury which had been told, and would be told again, that it could shift the burden of proof if it wanted to.

A. State Courts May Not Allow Juries To Ignore Defendants' Constitutional Protections.

The history of jury-as-judge provisions helps explain how such an instruction could be given in a modern court, and why it must not be given again. The idea that a jury's power to determine the law for itself to status of a right dates back at least to 1670.[4] In the eighteenth and early nineteenth centuries the right was incorporated in the constitutions of numerous states, and some assumed that federal juries had the same right.[5]

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[4]Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

[5]Howe, Juries As Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939); Scheflin, Jury

In federal courts, the issue was resolved early. In 1895, this Court held that in federal criminal trials, juries were bound to follow the instructions of the trial judge. Sparf v. United States, 156 U.S. 51, 102 (1895). The Court adopted the view of Mr. Justice Story, who in 1835 instructed a Massachusetts federal jury that, though it had the power to nullify the court's interpretation of the law, it had no right to do so. "On the contrary," he concluded,

> I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law . . . Every person accused as a criminal has a right to be tried according to the law of the land . . . and not by the law as a jury may understand it, or choose, from

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Nullification: The Right To Say No, 45 So. Cal. L. Rev. 168, 177 (1972).

> wantonness, or ignorance, or accidental mistake, to interpret it.

United States v. Battiste, No. 14,545, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (Story, J.)

Thereafter, it was defendants who most commonly asked for "jury nullification," urging federal judges to instruct their juries that the jurors had the right to determine the law for themselves and to nullify the charge given by the court.[6] Invariably these efforts failed. See, e.g., United States v. Anderson, 716 F.2d 446, 449-50 (7th Cir. 1983) (abortion protests); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (anti-war protests); United States v.

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[6]Scheflin & Van Dyke, Jury Nullification: The Contours of a Controversy, 43:4 Law & Contemp. Prob. 51, 52-56 (1980); Note, Jury Nullification And Jury Control Procedures, 65 N.Y.U.L. Rev. 825 (1990).

Krzyske, 836 F.2d 1013, 1021 (6th Cir.), cert. denied, 488 U.S. 832 (1988) (tax protests); United States v. Drefke, 707 F.2d 978, 982 (8th Cir.), cert. denied, 464 U.S. 942 (1983) (tax protests); United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (false passports); United States v. Wiley, 503 F.2d 106 (8th Cir. 1974) (tax protests); United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972) (anti-war protests); United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970) (anti-war protests).

In state courts, though, the issue was not resolved. The constitutions of Maryland, Indiana, Georgia and Oregon retain provisions empowering juries in criminal cases to determine the law. Indiana, however, differs from the

rest; alone among American jurisdictions, Indiana instructs its juries that they have this right.

Strangely, until the state court opinion in this case, no Indiana defendant had argued that the jury-as-judge instruction deprived him of federal rights.[7] This Court, however, made one brief pronouncement on the question in 1963, after it had been raised in two Maryland cases.

In both Maryland cases, Slansky v. State, 192 Md. 94, 63 A.2d 599 (1949) and Giles v. State, 229 Md. 370, 183 A.2d 359, 364-65 (1962), the defendants argued that the Maryland jury-as-judge provision deprived them of the due process and, in Giles's case, equal protection rights

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[7]Note, The Jury's Role Under the Indiana Constitution, 52 Ind. L. J. 793, 795 n.10 (1977).

guaranteed by the Fourteenth Amendment. In both cases, the Maryland Court of Appeals held that the Fourteenth Amendment did not protect the defendant from this state action. The Giles court said:

> [In Slansky], in holding that the constitutional rights of the defendant had not been abridged, we pointed out that the due process clause of the Fourteenth Amendment does not require the states to conform their criminal procedure to that of the federal courts, but left the states free to work out their own systems of criminal procedure as they had done for many years both before and after the adoption of the amendment. . . . So far as we are advised, the Supreme Court of the United States has not rendered any decision since Slansky which would now require a different result from that there reached by this Court.

Giles sought review from that holding in this Court. Not surprisingly in that day, the Court held that Giles's claim that Maryland trial procedure violated the due process clause of the Four-

teenth Amendment did not present a substantial federal question and dismissed the appeal. Giles v. Maryland, 372 U.S. 767 (1963).[8]

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[8]Since Giles, Maryland has recognized that jurors are not free to judge the law which implicates constitutional protections and has developed pattern jury instructions which advise juries in criminal trials that they are bound by those of the court's instructions which embody constitutional guarantees:

> Implicit in the decisions of this Court limiting the jury's judicial role to the "law of the crime" is a recognition that all other legal issues are for the judge alone to decide. Because of this division of the law-judging function between judge and jury, it is incumbent upon the trial judge to carefully delineate for the jury the following dichotomy: (i) that the jury, under Article 23, is the final arbiter of disputes as to the substantive "law of the crime," as well as the "legal effect of the evidence," and that any comments by the judge concerning these matters are advisory only; and (ii) that, by virtue of this same constitutional provision, all other aspects of law (e.g., the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury's pale, and that the judge's comments on these matters are binding upon that body.

In reliance upon the Supreme Court's holding in Giles that the Maryland constitutional provision did not create a Fourteenth Amendment issue, lower federal courts on two occasions have rejected challenges to Maryland convictions. Wyley v. Warden, 372 F.2d 742 (4th Cir.), cert. denied, 389 U.S. 863 (1967); Wilkins v. Maryland, 402 F. Supp. 76 (D. Md. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976), cert. denied, 429 U.S. 1044 (1977).

In granting this petition, this Court would announce that the Giles decision would be different today. While a jury instruction which authorized a jury to judge the law may have created no per-

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Stevenson v. State, 289 Md. 167, 423 A.2d 558, 565 (1980); see also Maryland Pattern Jury Instruction -Criminal 2:00A and 2:00B.

ceived Fourteenth Amendment issue in 1963, this Court has since made it clear that due process requires state jury instructions on constitutional protections, and that instructions which understate or dilute those protections violate due process. Griffin v. California, 380 U.S. 609 (1965) (state jury must not be instructed that it may consider the defendant's failure to testify as indication of guilt); In re Winship, 397 U.S. 358 (1970) (state jury must be instructed that state bears burden of proving all elements beyond reasonable doubt); Taylor v. Kentucky, 436 U.S. 478 (1978) (state jury must be instructed on presumption of innocence); Burch v. Louisiana, 441 U.S. 130 (1979) (six-person state jury must be instructed that its verdict must be unanimous); Sandstrom v. Montana, 442 U.S. 510 (1979) (state jury may not be

instructed that defendant must rebut presumption on any element); Carter v. Kentucky, 450 U.S. 288 (1981) (state jury must be instructed that defendant has privilege not to testify); Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (instruction relieving the state of the burden of proof beyond a reasonable doubt can never be harmless error). The Indiana pattern instruction tells juries that they may ignore every single instruction which this Court requires, and for that reason it cannot stand.

B. The Justifications Offered By The State For The Instruction Are Inadequate.

The two justifications that have been offered for the pattern instruction over the course of this litigation do not narrow or save it, as the Seventh Circuit implicitly recognized. ("We certainly do not want to be miscon-

strued as condoning th[is] problematic instruction," 8 F.3d at 568, App. A-22.) First, in its opinion on this appeal, the Indiana court of appeals explained that the jury's power is in fact limited and, as thus limited, constitutional; and that in any event, a jury which convicts on insufficient evidence can be overruled by judges. 552 N.E.2d at 515, App. D-9-11, quoting at length from Beavers v. State, 236 Ind. 549, 141 N.E.2d 118, 122 (1957).

Neither half of this justification blunts the harm of the instruction. First, though judges may indeed acquit defendants convicted by juries on insufficient evidence, the jury-as-judge instruction invites other constitutional error which no court can correct. No reviewing court can determine whether a jury decided to place upon a defendant the burden of proving his innocence, or

decided to drop the element of intent from a theft crime. See State v. Burpee, 65 Vt. 1, 25 A. 964, 973 (1892).

Second, judicial pronouncements that Indiana juries' powers are really limited miss the point. Appellate courts in Indiana know that a jury's right to judge the law is limited; the point is that the jury does not know it. When the jury is not told of the limitations on its powers, then those limitations do not exist as a practical matter.

A different justification convinced the federal district court which heard this habeas petition: the instruction's language. The court held that the instruction here was limited enough, relying on the instruction's caveat not to "make, repeal, disregard or ignore the law as it exists." Willis v. Aiken, No.

H91-147 slip op. at 15 (N.D. Ind. Dec. 4, 1991), App. E-23.

Far from narrowing the instruction, this language is worse than nothing. Accord Note, supra, 52 Ind. L.J. at 793, 797-98. To "make . . . the law as it exists" is meaningless; law that already exists cannot be made anew. The warning not to "repeal, disregard or ignore the law as it exists" flatly contradicted the phrase which preceded it: "You are to determine the law for yourself." Neither phrase has any meaning if the other is true. The next sentence further muddles the admonition by telling the jurors only that the judge is "the best source as to the law."

Most importantly, the jury was never told that it was bound absolutely by what the trial judge said on some issues -- and that is where the Four-

teenth Amendment was lost. The jury was not told that procedural constitutional protections must be honored and then the jury was urged not to honor those protections when the prosecutor told them that it just was "not fair" to make the state carry the burden of proof. T.R. at 651. Even courts that have upheld jury-as-judge instructions would not have done so in the face of such an argument: "Had the prosecution argued unconstitutional legal propositions to the jury, in order to subvert the valid instructions of the trial judge, this court might take a different view of this petition." Wilkins, 402 F. Supp. at 82.[9]

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[9]Should this petition be granted, Willis will also argue the instruction invited the jurors to alter the elements of the charged offense, depriving him of his constitutional rights to notice and a meaningful appeal. Again, in his trial, that deprivation is more than theoretical. The state used a voir dire example, evidence of disciplinary complaints, and expert testimony on lawyers' duties in a way that could

Indiana's pattern jury-as-judge instruction invites juries to ignore other instructions, those which implement constitutional protections and set out the elements of crimes, as surely as if it inserted the words "if you decide you want that to be the law" after every jury instruction required by the Constitution. Convictions tainted by that instruction cannot stand; neither can the Indiana court of appeals decision in this case, which is precedent that such convictions are fine.

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invite the jury to substitute, for the intent element of this crime, a higher standard of conduct for lawyers. That made the jury-as-judge instruction especially dangerous to him.

II. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS INTERPRETED COLEMAN V. THOMPSON IN SUCH A WAY AS TO RENDER USELESS THE PRESUMPTION OF HARRIS V. REED.

The Seventh Circuit's opinion made it clear, perhaps as explicitly as lower courts respectfully can, why this issue is appropriate for certiorari. This case, it said, represented "a specific but recurring litigation problem that has not yet been the focus of Supreme Court guidance: When the state court addresses a federal constitutional issue but only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue constitutes 'fundamental error.'" 8 F.3d at 562, App. A-8-9. The court continued: "Today, we continue our attempt to follow a path that the Supreme Court has cut only partially and where future directions are only dimly illu-

mined by current precedent." 8 F.3d at 563, App. A-10-11.

With that uncertain introduction, the Seventh Circuit decided this case. The procedural issue was the application of the "Harris presumption," under which federal courts address federal habeas claims where the decision of the last state court to hear them "fairly appeared to rest primarily on those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground." Coleman v. Thompson, 111 S.Ct. 2546, 2557 (1989) (interpreting Harris).

If Harris applied, Willis won. The state court had certainly reached the merits of Willis's constitutional argument, that was clear, 8 F.3d at 562, App. A-9-10; and there was no statement anywhere in the Indiana opinion that it did

not intend to base its decision on the merits.[10]

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[10]Indeed, the structure of the state court opinion here is practically indistinguishable from that reviewed in Harris, mentioning but never relying on the defendant's failure to preserve the error. The Harris court said:

> Applying the 'plain statement' requirement in this case, we conclude that the Illinois Appellate Court did not 'clearly and expressly' rely on waiver as a ground for rejecting any aspect of petitioner's ineffective-assistance-of-counsel claim. [citing Michigan v. Long, 463 U.S. 1032, 1041 (1983)] To be sure, the state court perhaps laid the foundation for such a holding by stating that most of petitioner's allegations 'could have been raised [on] direct appeal.' App. 12. Nonetheless, as the Court of Appeals recognized, this statement falls short of an explicit reliance on a state law ground.

489 U.S. at 266. In the accompanying footnote, the Court continued:

> While it perhaps could be argued that this statement would have sufficed had the state court never reached the federal claim, the state court clearly went on to reject the federal claim on the merits. As a result, the reference to state law in the state court's opinion is insufficient to demonstrate clearly whether the court intended to invoke waiver as an alternative ground. It is precisely with regard to such an ambiguous reference to state law in the context of clear reliance

But the Seventh Circuit held that the Harris presumption did not apply, because its predicate was not satisfied; the state court decision did not fairly appear to rest on or be interwoven with federal law. 8 F.3d at 565-67, App. A-16-18, 20. The Indiana court had reached the merits, yes, but only in the "procedural context" of Willis's fundamental error argument. 8 F.3d at 562, App. A-10. Since "fundamental error" is an independent Indiana doctrine, the court concluded, Willis II's holding upholding the instruction was immune from federal review.

The Seventh Circuit reached this result by applying, as best it

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> on federal law that Long permits federal review of the federal issue.

Id. at n. 13.

could, one case: Coleman v. Thompson, 111 S.Ct. 2546, 2557 (1989). In Coleman, this Court held that a Virginia decision which was silent on the merits[11] did not fairly appear to rest on federal grounds, even though the state court might implicitly have had to decide that the challenged trial errors were not so great as to justify forgiving the procedural default. The standards by which Virginia decided to forgive such defaults, this Court said, were independent of federal law. 111 S. Ct. at 2560.

"After Coleman," said the Seventh Circuit here, "we believe that the formalism of [Harris] is no longer the controlling factor. We also believe

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[11] In Coleman, the state appellate court granted a motion to dismiss the appeal because the notice of appeal was late. The motion was not based on federal grounds and none were mentioned in the state court's summary order.

that, because it remains our duty to 'examine the scope of the relevant state court judgment,' [citing Coleman at 2559], it is permissible for us to examine the caselaw of Indiana to determine the function that the fundamental error doctrine plays in its appellate process." 8 F.3d at 565-66, App. A-18-19.

In construing Coleman to alter Harris, rather than simply to apply it, the Seventh Circuit missed the crucial distinction between the two cases. In Harris, the state court opinion discussed the merits; in Coleman, it did not. Thus the Seventh Circuit also missed the distinction here: in Coleman, there was no precedential state court decision upholding an unfair trial. In Willis, there is.

This section will show why Coleman cannot change Harris in cases

where the state court reached the issue. If plain statements of reliance on state grounds are not required in those cases, then Harris is overruled, and under the "fundamental error" analysis that will take its place, most state errors of federal law will stand as precedent.

A. Coleman Cannot Be Extended To Cases Where The State Court Discussed The Issue.

The Seventh Circuit's interpretation of Coleman applies to nearly every habeas case, since all or nearly all the states have fundamental error doctrines. In every case where the state court held (or, as here and in Harris, obliquely referred to a possible) waiver but then discussed the merits of the issue, the Seventh Circuit reads Coleman to say that courts must examine states' fundamental error doctrines as predicate to Harris's plain statement rule. If the fundamental

error doctrine is itself independent, no plain statement will be required.

That made sense in Coleman, where this Court needed to determine the intent of an order which was silent on the merits. The order did not "fairly appear" to have any connection to federal law; but before declaring the Harris predicate unsatisfied there, this Court examined the state's fundamental error doctrine as a check to see whether the state court had implicitly, necessarily, relied on federal law.

Extending Coleman to this case, where the Harris predicate clearly is satisfied on the face of the state decision, does harm to jurisprudence and to justice. As to jurisprudence, under the Seventh Circuit's analysis, no court will ever get past the Harris predicate; plain statement analysis no longer applies in

any case. In its place is a test based on fundamental error. If the state's fundamental error doctrine is independent, the state opinion does not fairly appear to rest on federal law and review is barred even without a plain statement; and if the fundamental error doctrine is based on federal law, no plain statement could bar review, since the waiver holding itself is not independent.[12] The Seventh Circuit has, unintentionally but no less completely, overruled Harris, and habeas review in that circuit now depends on the happenstance of how a state's fundamental error doctrine evolved.

The harm to justice follows. Under the Seventh Circuit's analysis, in states whose fundamental error doctrines are deemed independent, habeas review is

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[12]The latter statement is the holding of Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

barred, even where, as here, the state court opinion stands as state precedent for federal error.

Indeed, this case highlights one reason we need state courts to plainly tell us when they are relying on state law, one that even Harris did not underscore. Such statements help the federal courts "rapidly to identify whether federal issues are properly presented," yes - Harris, 489 U.S. at 265 - but they do something more. Such statements warn state courts, and state lawyers, that the precedent they are reading is limited. Had the court in Willis II said, "This issue is waived, and is not fundamental error under our idiosyncratic state doctrine, and that is the basis for our holding," Indiana courts presumably would not be citing Willis II today for its substantive holding. But there is no

such statement, so courts and trial lawyers see no reason to challenge this instruction again.[13]

Willis hopes this Court will agree with the Seventh Circuit that the impact of fundamental error on Harris is a recurring problem in real need of a solution from this Court. He further

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[13]In Ake v. Oklahoma, the Court analyzed state fundamental error doctrine in a case where the state court discussed the merits. But that case demonstrates exactly the point of this section. The point of Ake's examination of fundamental error doctrine was not to decide whether the Harris predicate was satisfied. Instead, the Court held, there was no need to recite the entire Harris analysis (predicate, plain statement, independence of any plainly stated ground) because its outcome was clear. Oklahoma's waiver law was so clearly dependent on federal law that the Harris analysis would mandate review. Had Oklahoma's waiver law been different, the Harris analysis would still have led the Court to require a plain statement to save this explicit discussion upholding the trial court's failure to appoint a psychiatrist, because the opinion could be cited for the proposition that such a failure was fine under the federal constitution. That is, Ake allows courts to skip to the end of the Harris analysis if the state's waiver doctrine is based on federal law, but not to jettison Harris if it is not.

urges that Harris, for the good reasons stated in that case and those demonstrated by this one, remain the law.

B. Indiana's Fundamental Error Law, And Thus The State Court Opinion Even As The Seventh Circuit Read It, Is Thoroughly Bound Up In Federal Constitutional Law

Should certiorari be granted, Willis intends also to argue that even if habeas review did depend, after Coleman, on the nature of the state's fundamental error doctrine rather than on plain statements, Indiana's decision was inseparable from its construction of federal law. Indiana's fundamental error doctrine is thoroughly bound up in federal law, so thoroughly that had the Indiana court found that the pattern instruction did deny federal due process, it would have been bound to grant Willis relief. The full error of the Seventh Circuit's contrary holding is demon-

strated here; the state Willis opinion is treated in Indiana as precedent for its holding on the merits. Even under the Seventh Circuit's construction of Coleman, Indiana relied on federal law, not state law.

III. UNDER THE SEVENTH CIRCUIT'S APPLICATION OF TEAGUE V. LANE, ALL RULES ARE NEW.[14]

"Because the foregoing discussion [of Coleman's effect on the Harris presumption] involves an issue on which there is no definitive guidance from the Supreme Court," 8 F.3d at 567, App. A-20, the Seventh Circuit reached an alternative holding. It held that Willis's petition was barred by Teague v. Lane, 489 U.S. 288 (1989), because it sought a

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[14]This section shows simultaneously that the rule Willis seeks is not "new" under Teague and is "implicit in the concept of ordered liberty," an exception to Teague, because both are true for the same reasons.

"new rule" which did not implicate "the fundamental fairness and accuracy of the criminal proceeding." Id. at 568, App. A-22, quoting Gilmore v. Taylor, 113 S. Ct. 2112, 2119 (1993) (in turn quoting Teague at 311).

This section of the opinion too was cautious, almost uncertain. "We certainly do not want to be misunderstood as condoning the problematic instruction at issue in this case," the court said. 8 F.3d at 568, App. A-22. And "[w]e are aware," the court went on, that the Supreme Court has held recently that an instruction relieving the state of the burden of proof beyond a reasonable doubt cannot be characterized as harmless error." Id., App. A-22-23, citing Sullivan v. Louisiana, 113 S. Ct. 2078 (1993). Nevertheless, said the court, the state court's decision was "on the basis of the

established caselaw of the Supreme Court of Indiana[15] and not in contravention of any explicit precedent of this court or, more importantly, the Supreme Court of the United States," id., and "whatever its potential for confusion," id., App. A-23, it was not one of Gilmore's "small core of rules implicit in the concept of ordered liberty." Id.

If that is right, then habeas corpus is dead. If it is "new" to require state juries to to presume innocence, to reach unanimous verdicts when only six are sitting, and to hold to the reasonable doubt standard, for every element, then all rules are new.

For the two decades before this trial, it had been clear that the funda-

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[15]Here, even the Seventh Circuit seems to slip into the obvious reading of the Indiana decision - that it was based on the merits, not on waiver.

mental trial protections of the Bill of Rights are binding upon the states by virtue of the Fourteenth Amendment and, specifically, that instructions diluting or misstating those protections were cause for reversal. From Griffin in 1965 through Winship, Taylor, Burch, and Sandstrom, Carter, to Sullivan last year, this Court consistently required that state courts' jury instructions implement the Constitution's trial guarantees. Those decisions leave no room for a side instruction which makes those guarantees optional.

Indeed, the rule has been, truly, implicit to the concept of ordered liberty since long before Griffin:

> "The doctrine that jurors are judges of the law in criminal cases abolishes the sacred 'law of the land,' which, since the days of King John and Magna Charta, has been the birthright of all English-speaking people, and tends to

> the exercise of irresponsible arbitrary power. They are judges whose decision cannot be reviewed. Their decrees are irrevocable and final. If they set aside a constitution or a statute, their act cannot be questioned. If in the jury room they legislate and enact a law for the case in hand it never sees the light of day; it is a mystery and a myth; no one can lay his hands upon it; no one can construe or interpret it; it affords no guide for the future, for it vanishes into nonentity the moment the verdict is returned, and the verdict makes no sign; the decision and the judges quickly disappear.
>
> 'The showman and the show, Themselves but shadows, into shadows go.'"

State v. Burpee, 65 Vt. 1, 25 A. 964, 973 (1892); see also Battiste, 24 F. Cas. at 1043.

CONCLUSION

It is not too strong to say that the fairness and legality of every criminal trial in Indiana, and as to the "new rule" issue, the writ of habeas corpus itself, depend on the answers to the

questions presented in this petition. Willis asks that it be granted.

Respectfully submitted this 27th day of January, 1994

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